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6 IN THE DISTRICT COURT OF GUAM
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8 UNITED STATES OF AMERICA,)
9 Plaintiff,)
10 v.)
11 GOVERNMENT OF GUAM,)
12 Defendant.)
13 _____)

CIVIL CASE NO. 02-00022

ORDER
RE: CASH PAYMENTS

14 This matter came before the court on January 14, 2009, for a quarterly status hearing. At that
15 time, the Receiver, Gershman, Brickner & Bratton, Inc. (“GBB”) provided an update on the progress
16 of Consent Decree projects and on the operations of the Solid Waste Management Division
17 (“SWMD”). *See* Docket No. 328. Among other things, GBB reiterated its continued need for the
18 court’s assistance in securing the funds necessary for Consent Decree projects. To that end, GBB
19 requested the court order the Government of Guam to make payments pursuant to a schedule if the
20 Government of Guam failed to adopt GBB’s recommendation to fund these projects through revenue
21 bonds with a Section 30 backstop. *Id.* The court **HEREBY GRANTS** that request for the reasons
22 further discussed herein.

23 **I. BACKGROUND**

24 The historical background of this case leading up to the entry of the Consent Decree on
25 February 11, 2004, has been presented in several prior orders. *See* Docket Nos. 125, 218, 239
26 and 272. It will, however, be summarized herein to emphasize the history of inaction that has
27 defined the Government of Guam’s noncompliance with the mandates of the Clean Water Act
28 (“CWA”) and the Consent Decree entered into by the parties.

1 **A. INITIATION OF SUIT AND CONSENT DECREE**

2 After six years of minimal progress by the Government of Guam in response to various
3 administrative orders, on August 7, 2002, the United States filed the instant action, asserting claims
4 under the CWA. *See* Docket No. 1. The United States sought to force the closure of the Ordot
5 Dump and to require the Government of Guam to construct a cover system at the Ordot Dump to
6 eliminate discharge of leachate. *Id.*

7 Shortly after the suit was filed, the parties participated in settlement conferences facilitated
8 by then-Chief Judge John S. Unpingco. After about one year of negotiations, the parties entered into
9 the Consent Decree requiring the Government of Guam to come into compliance with the mandates
10 of the CWA.¹ Notice of the Consent Decree was published in the Federal Register and requested
11 public comment on the proposed decree for a period of 30 days.² *See* Docket No. 49. This public
12 comment period was not a pointless exercise. “[T]he manifested willingness of EPA to thoroughly
13 consider all oral and written comments made with regard to the proposed decree” is a key indicator
14 of whether the decree was negotiated in good faith and is fair. *United States v. Akzo Coatings of*
15 *America, Inc.*, 949 F.2d 1409, 1435 (6th Cir. 1991). No member of the Guam Legislature submitted
16 public comment or lodged objection as to the terms of the Consent Decree.³ *See* Docket No. 49,
17 p. 1. Neither did any member ever seek to intervene in this action. The court subsequently approved
18 and entered the Consent Decree. *See* Docket No. 55.

19
20 ¹ Specifically, the Consent Decree stated that it “shall apply and be binding upon the Government
21 of Guam and its boards, directors, agencies, authorities, departments (including and not limited to
22 DPW and the Guam Environmental Protection Agency (“GEPA”)), and their successors and assigns,
and on the United States on behalf of the U.S. EPA.” Docket No. 55 at ¶2.

23 ² Public comments were submitted by Concerned Citizens to Close Ordot, the Mayors’ Council of
24 Guam and Guam Resource Recovery Partners.

25 ³ Five of the current members of the Guam Legislature (Frank Aguon, Jr., Tina Muna-Barnes, Ben
26 Pangelinan, Rory Respicio and Ray Tenorio) served as senators in 2003-2004 when the Consent
27 Decree was negotiated and eventually approved. The court also notes that Senator Pangelinan was
28 then Speaker of the 27th Guam Legislature, Senator Aguon was the Vice-Speaker, and Senator
Respicio was the chairperson of the Committee on Youth & Senior Citizens, Federal & Foreign
Affairs, Military & Veterans’ Affairs, and Human & Natural Resources.

1 Among other things, the Consent Decree notably established a schedule for the closure of
2 the Ordot Dump and the construction and operation of a new conforming municipal solid waste
3 landfill facility (“MSWLF”). To this end, by March 2004, the Department of Public Works
4 (“DPW”) was to submit a list of three potential landfill sites to the United States Environmental
5 Protection Agency (“USEPA”) and Guam Environmental Protection Agency (“GEPA”). *Id.* at
6 ¶9(a). After an Environmental Impact Statement was completed, DPW was required to advise the
7 USEPA of the preferred site. *Id.* at ¶9(b). By October 2006, DPW was required to award a
8 construction contract for the new MSWLF. *Id.* at ¶9(h). The Consent Decree required operations
9 at a new sanitary landfill to begin by September 22, 2007, with operations at the Ordot Dump to
10 cease by October 22, 2007. *Id.* at ¶¶8(i) and 9(i).

11 Additionally, pursuant to ¶10(a) of the Consent Decree, the Government of Guam was
12 required to submit a financial plan for funding the various Consent Decree projects, including the
13 funding source or sources and a schedule to secure funds for the capital and operating costs
14 necessary to implement said actions. The Government of Guam’s financial plan of 2004 indicated
15 a preference for financing the initial sum of approximately \$100 million through revenue bonds.
16 *See* Docket No. 69, at Attachment 14. These revenue bonds would then be re-paid through the
17 collection of tipping fees.⁴

18
19 ⁴ In April 2006, the Public Utilities Commission (“PUC”) contracted with the Georgetown
20 Consulting Group (“GCG”) to examine whether DPW was capable of efficiently billing and
21 collecting the increased rate revenue which would be required to fund the Government of Guam’s
22 obligations under a proposed revenue bond. The PUC had determined that in order to enable DPW
23 to meet its bond obligation, the tipping fees would have to be increased approximately 400% above
24 the current rates within the next 26 months. The GCG’s August 2006 “Focused Audit Report and
25 Recommendations” found that

- 26 (a) DPW’s current billing and collection system is unable to competently handle
27 even the current rate revenue levels much less the increased burden necessary
28 to support the revenue bonds.
- 29 (b) Substantial remedial action, including operational changes, legislation,
30 regulatory action and rule-making must immediately occur to enable DPW
31 to bill and collect the revenue necessary to fund revenue bond requirements.

1 **B. POST-CONSENT DECREE ACTIVITY**

2 The Government of Guam did not meet the various deadlines set forth in the Consent Decree.
3 As a result of the failed compliance, on January 31, 2007, the United States moved the court to
4 enforce the Consent Decree “and to enter an order fully enforcing its requirements.” *See* Docket
5 No. 68, at p. 3. The United States asserted that, based on the failure to meet “critical deadlines” such
6 as the awarding of the closure and construction contracts, “it is readily apparent that [the
7 Government of Guam] will not only fail to operate a new landfill by September 22, 2007, but it will
8 also fail to close the Ordot Dump and cease its illegal discharges by October 22, 2007, as required
9 by the Consent Decree.” *Id.* at p. 2. In turn, the Government of Guam filed a Motion to Modify
10 Consent Decree, requesting that operations at the new landfill in Layon begin on or about
11 July 30, 2010, with the eventual closure of the Ordot Dump slated for December 16, 2011. *See*
12 Docket No. 76. Both motions were heard by U.S. Magistrate Judge Joaquin V.E. Manibusan Jr. on
13 March 8, 2007. The Magistrate Judge recommended that the Government of Guam’s request to
14 modify the Consent Decree be denied. *See* Docket No. 125. This court adopted his
15 recommendation. *See* Docket No. 177.

16 This court then began conducting monthly status hearings and site visits in October 2007.
17 *See* Docket No. 146. The court found the conditions at the Ordot Dump both alarming and
18 inexcusable. After the status hearings held in October and November of 2007, it was evident that
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21 (c) If this remedial action does not occur, DPW will not be able to bill and
22 collect the revenues necessary to fund revenue bond obligations and this
23 burden would fall, in part, on the General Fund. Regulatory principles could
24 obstruct the PUC (i) from awarding rate increases to compensate for DPW
25 billing and collection mismanagement; and (ii) from increasing SWM
26 residential customer rates unless the quality of residential service is
27 dramatically improved.

28 *See* Docket No. 69, at Attachment 12.

Because of GCG’s finding regarding DPW’s poor residential service and billing and
collection mismanagement, the PUC was reluctant to raise the residential tipping fee rates, making
bond financing unlikely.

1 the closure of the Ordot Dump had never been a priority of the Government of Guam. The most
2 critical component to the closure of the Ordot Dump was the selection and acquisition of the new
3 landfill site.⁵ Although the Government of Guam was able to make a site selection, it took no
4 initiative to acquire the private property. It was only after being ordered by this court to do so did
5 the Government take such action. *See* Docket No. 218.

6 Instead of the island's leadership acting cooperatively and in concert toward meeting the
7 mandates of the Consent Decree, obstacles were put in place to hamper compliance. For example,
8 the Legislature had enacted legislation that made it impossible to open the new landfill.
9 Specifically, it enacted Section 98 of Guam Public Law 29-19 ("Public Law 29-19"), which
10 prohibited the expenditures of funds for any landfill site that the Government of Guam did not yet
11 "own."⁶ As enacted, the law prohibited expenditures toward the opening of the MSWLF at Layon
12 because the Government of Guam did not own the property. This law clearly paralyzed the
13 Government of Guam's ability to comply with the mandates of the Consent Decree. The court
14 determined that the law, as written, risked "impairing the Government of Guam's ability to comply
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16 ⁵ The Government of Guam selected Layon as the new landfill site, with the concurrence of USEPA
17 after several other sites were considered by professionals and dismissed as unsuitable. There were
18 **more than 20 sites** initially identified. A first level screening narrowed the number of potential
19 sites to the following 12 sites: Dandan, Kurason Estates Subdivision, Baza Gardens Area, Kaskada,
20 Cotal West, Tenjo River Basin, Malaa, Majulosna, Sabana Baeta, Lonfit, Nimitz Hill
21 COMNAVMAR and Sasa River Basin. Further screening eliminated another six sites, and the
22 remaining six were evaluated and scored, with **Layon** receiving the highest scores. *See* Docket No.
23 272, at p. 11. Thus, Layon was selected, agreed upon by the parties, and subsequently approved by
24 this court.

25 ⁶ On September 29, 2007, Guam Public Law 29-19 was enacted, and Section 98 of that law
26 provided:

27 **(b) Prohibition of Expending Public Funds.** All government of Guam agencies,
28 departments, bureaus, boards, commissions, public corporations, autonomous and
semi-autonomous agencies, including . . . all other government instrumentalities,
shall not expend funds on site-specific preparation, design work, mitigation,
infrastructure upgrade *or* installation, *or* construction of a new landfill, *unless* the
government of Guam has acquired and recorded fee simple ownership of the property
in question.

1 with the provisions of the Consent Decree and defeated the purpose of the Clean Water Act.”
2 Docket No. 218. Thus, while acknowledging its strong respect for the sovereignty of our local
3 government, the court invoked the Supremacy Clause and struck down Section 98 of Public Law
4 29-19 as unconstitutional and void, insofar as the law defied compliance with the Consent Decree.
5 Without this legislative impediment, it was anticipated that the Government of Guam would move
6 forward with construction of the MSWLF at Layon.⁷

7 However, there was only limited and sporadic progress toward complying with the Consent
8 Decree. *See* Docket No. 239. In fact, at the March 14, 2008 hearing, it was reported that the
9 Government of Guam was uncertain as to the means of funding for the closure of the Ordot Dump
10 or the opening of the new landfill. Furthermore, DPW had not included any Consent Decree projects
11 in its operating budget, relegating these requests to a supplemental budget which was represented
12 as a “wish list” of “unfunded mandates.”

13 **C. FEDERAL RECEIVERSHIP**

14 Despite the court’s repeated pleas for a joint resolution, the lack of cooperation between the
15 Executive and Legislative branches to find a solution, only intensified the Ordot Dump crisis. As
16 time passed with no real work shown towards compliance, doubts increased as to the Government
17 of Guam’s ability to close the Ordot Dump and open the new landfill within a reasonable time.
18 Accordingly, the court invoked its equity jurisdiction and Rule 70 of the Federal Rules of Civil
19 Procedure and appointed GBB as the federal receiver to manage, supervise, and oversee DPW’s
20 SWMD. *See* Docket No. 239.

21 When the GBB team arrived on Guam in April 2008, they immediately began assessing
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25 ⁷ Another legislative roadblock was Resolution 103. In December 21, 2007, the 29th Guam
26 Legislature passed Resolution 103 which essentially urged this court to reconsider the Layon site
27 for the MSWLF, a site which the Government of Guam itself selected. *See* Docket Nos. 187
28 and 188. The court declined to supplant the objective decision made by scientists and engineers
with the political whims of certain members of the Legislature. *See* Docket No. 198.

1 SWMD's operations. GBB found SWMD's working conditions deplorable.⁸ At that time, there was
2 only one government-owned garbage truck that was operable, which led to DPW's renting additional
3 trucks from private enterprises and implementing a three-shift schedule for residential refuse
4 collection. Furthermore, all the heavy equipment used at the Ordot Dump was rented because the
5 government-owned equipment was in a state of severe disrepair. There was rampant
6 mismanagement of operations and assets. By way of example, rather than repair a government
7 owned excavator, the Government of Guam instead opted to rent an excavator at a cost of
8 approximately \$260,000 a year.⁹

9 Since the appointment of GBB, there have been noteworthy improvements in SWMD's day-
10 to-day operations, in the employee working conditions at the Ordot Dump and in the SWMD facility
11 in general, all of which are crucial to the successful closing of the Ordot Dump and the opening of
12 the new landfill at Layon.

13 In its second Receiver's Quarterly Report, GBB reported that as a result of acquiring new
14 equipment and entering into contracts outside of DPW for qualified maintenance services, SWMD
15 now had an operating fleet of garbage trucks and that employees had been restored to a normal
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18 ⁸ Efforts to close the Ordot Dump undeniably require that the staff of SWMD be given the proper
19 tools, resources and facilities, with which to accomplish SWMD's mission. This court conducted
20 an unannounced site visit to SWMD facilities, and found the employees' shower room with no stalls
21 and no shower heads. An employee who wished to shower did so by getting close to a moldy wall
22 with water discharging from a hole on the wall. One garbage truck had an operator sitting on a
23 kitchen chair in the cab of the truck because the original seat had been removed. The fleet
24 maintenance shop had no roof to protect the staff who had to make repairs to the trucks.
25 Additionally, DPW staff brought personal supplies to work in order to repair the government-owned
26 trucks. These atrocious working conditions no doubt contributed to the poor residential service
27 noted by GCG. The court revisited the facilities a couple of months later and noticed substantial
28 improvements in these areas.

25 ⁹ GBB reported that in the year 2000, the excavator broke down and needed a fan belt replaced at
26 a cost of \$118. *See* Docket No. 269. Rather than replace the belt, the Government of Guam chose
27 to rent an excavator for the next several years. The cost of renting the excavator for the year 2008
28 alone was almost \$260,000. A new excavator could have been purchased for approximately
\$200,000. If an excavator was rented for the past eight years (at the stated annual rate herein), the
Government of Guam spent over \$2 million instead of replacing a \$118 fan belt.

1 working schedule of one shift, rather than two or three shifts.¹⁰ *See* Docket No. 269. The resulting
2 financial savings to the Government of Guam are tangible and quantifiable. It was reported to this
3 court that the costs of rented equipment ran as high as \$11,000 a day. At this rate, the leased
4 equipment exceeded \$4 million annually (almost two-thirds the annual budget of the SWMD). The
5 cost of rental equipment dropped from a high of \$11,000 per day in April 2008 when GBB arrived
6 on Guam to \$1400 per day in September 2008 to only \$464 per day as reported by GBB in
7 January 2009. *See* Docket No. 328.

8 SWMD has since been reorganized and there has been a reduction in staff by approximately
9 25%. In March 2008, there were 99 staff members. *See* Docket No. 269. In September 2008 that
10 number was reduced to 76 employees. *Id.* As of the end of December 2008 that number has been
11 further reduced to only 72 employees. *See* Docket No. 328, Part 1. This represents approximately
12 a 27% reduction. *Id.* Most of the reduction in staff was through attrition. The reduction in
13 workforce has not affected the efficiency in operations. As noted, shifts have been reduced from
14 two or three to one. *Id.*

15 Aside from financial savings to the Government of Guam, GBB has also brought about
16 positive changes in the operations at the Ordot Dump. In July 2008, GBB implemented a materials
17 ban on green waste, construction waste and cardboard. Because of the ban, the average daily
18 volume of waste going into the Ordot Dump was reduced from 512 cubic yards to 360 cubic yards,
19 an approximate 30% reduction after the ban.¹¹ In addition, GBB implemented recycling initiatives
20 that allow villagers to drop off certain recyclable materials at designated locales. These measures
21 not only save vital space at the Ordot Dump, but make recycling easier and more convenient.

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23 ¹⁰ According to GBB, the purchase of the new equipment and the institution of new contracts for
24 maintenance services were made possible by Governor Felix P. Camacho's Emergency Purchase
Executive Order. *See* Docket No. 269.

25 ¹¹ In its third Receiver's Quarterly Report, GBB reported that as a result of the worldwide economic
26 downturn and its impact on recycling markets, SWMD has had to discontinue its recycling of mixed
27 paper as of December 2008. *See* Docket No. 328. This unfortunate turn of events has led to an
28 increase in the volume of trash going to the Ordot Dump and only further underscores the need to
keep construction of the Layon landfill moving as fast as possible.

1 Compliance with the Consent Decree necessarily includes plans regarding the new landfill
2 in Layon. The closure of the Ordot Dump cannot begin until the new landfill is completed and
3 operating. To that end, GBB proposed a timetable for the Consent Decree projects which this court
4 adopted. *See* Docket No. 272. Under this timetable, the Layon MSWLF is anticipated to begin
5 accepting waste in the Fall of 2011. *See* Docket No. 269. Additionally, GBB emphasized that
6 having access to adequate capital funding for Consent Decree projects is the most important
7 challenge faced by GBB in bringing the SWMD and the Government of Guam into compliance with
8 the Consent Decree.

9 **D. GBB’S FINANCING RECOMMENDATION**

10 At the October 22, 2008 status hearing, GBB presented various financing options available
11 to the Government of Guam and submitted its recommendation as to which option it thought best.
12 *See* Docket No. 269. Given the financial challenges facing Guam, GBB recommended that the
13 Government of Guam issue traditional revenue bonds with a Section 30 backstop. GBB stressed
14 that funds must be available to begin construction in January 2009¹² and made available on an on-
15 going basis to meet the timetable. If funding was not provided for as recommended by GBB and
16 construction was stalled yet another year, real economic repercussions would result, such as
17 requiring the Government of Guam to ship waste off-island.¹³

18 The court adopted GBB’s timetable and ordered the Government of Guam to deposit \$20
19 million with a trustee designated by GBB by January 5, 2009. *See* Docket No. 272. In addition, the
20 Government of Guam was ordered to file a financing plan no later than December 1, 2008, providing
21 for the funding of all Consent Decree projects.

22 On December 1, 2008, the Government of Guam filed its “financing plan,” *see* Docket
23 No. 293, which set forth various legislation, both proposed and enacted, including proposed
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25 ¹² Once construction of the landfill begins, it will likely require two “dry seasons” for the project
26 to be completed. *See* Docket No. 269.

27 ¹³ Any delay in the closure of the Ordot Dump beyond the projected two years would likely result
28 in the dump running out of air space.

1 legislation that essentially adopted GBB's recommendation. Based on this submission, the
2 Government of Guam intended to seek a short term loan or line of credit in the form of bond
3 anticipation notes while it waited for the market conditions to stabilize before seeking bond
4 financing. GBB, however, expressed its doubts that the Legislature would actually approve such
5 proposed legislation, given the Legislature's history of impeding the Government of Guam's ability
6 to develop and construct the Layon landfill. *See* Docket No. 299.

7 Because the January 5, 2009 deadline for depositing the \$20 million ordered by the court was
8 fast approaching, an expedited status hearing was held on December 10, 2008. At that hearing there
9 was a consensus by five financial experts and the Governor of Guam that the financial plan
10 recommended by GBB should be implemented.¹⁴ The court agreed that the most fiscally
11 responsible way to finance the Consent Decree projects would be through Section 30-backed
12 revenue bonds. The court also found that by failing to present a unified and workable financing plan
13 by December 1, 2008, the Government of Guam, had, in effect, decided to pay for Consent Decree
14 projects on a cash basis. Docket No. 312, at p. 3.

15 **II. RECENT DEVELOPMENTS**

16 On December 11, 2008, the Guam Legislature called an emergency session to discuss
17 Bill 402, which was submitted by the Governor and sought authority for the Governor to obtain a
18 \$20 million bridge loan using Section 30 funds as collateral. The Legislature made amendments to
19 Bill 402, providing for the bridge loan of \$20 million to be a general obligation of the Government
20 of Guam guaranteed by various securities, including Section 30 funds. The amended bill was
21 quickly enacted into law, and the \$20 million was timely deposited with the selected trustee,
22 Citibank, N.A ("Citibank").

23 At the quarterly status hearing held on January 14, 2009, GBB proposed, that the court adopt

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25 ¹⁴ Specifically, the expert retained by the United States, Jonathan Shefftz; Bureau of Budget
26 Management and Research ("BBMR") Director, Bertha Duenas; Government of Guam's Bond
27 Counsel, Stanley J. Dirks; Acting Guam Economic Development Authority, Rita Nauta; Public
28 Finance Management, Inc.; and the Governor all agreed that GBB's debt financing recommendation
was the preferable option to fund Consent Decree projects. The Legislature, unfortunately, did not
share that opinion.

1 a schedule of cash payments the Government of Guam would be required to make to Citibank. *See*
2 Docket No. 328, Tab 5 (also attached hereto). This recommendation was made because only \$20
3 million had been obtained for funding Consent Decree projects and there was no guarantee that
4 additional funds would be forthcoming through the proposed legislation.

5 In response to GBB's recommendation, counsel for the Government of Guam requested it
6 be given an opportunity to respond to the recommended cash payment schedule within one week.
7 The court granted the request, and further granted the Government of Guam's subsequent request
8 for an extension of time to file its response. *See* Docket Nos. 330 and 337. The court ordered that
9 the extension of time be limited for the purpose of addressing alternative financing options for the
10 closure of the Ordot Dump and the opening of the new MSWLF at Layon. *See* Docket No. 337.

11 On February 2, 2009, the Government of Guam filed a "revised financing plan." *See* Docket
12 No. 344. The Government of Guam's revised plan essentially mirrored its December 1, 2008
13 proposal, authorizing Section 30 backed revenue bonds. The new proposed legislation would also
14 authorize the Government of Guam to enter into a lease-back arrangement with a private entity if
15 such an arrangement can be concluded in a manner that is both consistent with the Consent Decree
16 and the timetable adopted by this court for the construction of the new landfill at Layon.

17 GBB submitted its response to the Government of Guam's revised financing plan on
18 February 5, 2009. *See* Docket No. 352. On February 10, 2009, USEPA filed its response to the
19 Government of Guam's submission. *See* Docket Nos. 353-54. GBB and the USEPA both maintain
20 that enacting legislation authorizing revenue bonds backed by Section 30 funds will allow for
21 compliance with the Consent Decree while minimizing the financial impact to the people and the
22 Government of Guam.

23 **III. DISCUSSION**

24 A consent decree not only reflects "an agreement of the parties," but also "an agreement that
25 the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is
26 subject to the rules generally applicable to other judgments and decrees." *Rufo v. Inmates of Suffolk*
27 *County Jail*, 502 U.S. 367, 378 (1992). "[B]ecause a consent decree is a court-approved order, a
28 district court has broad equitable discretion to enforce the obligations of the decree." *King v. Allied*

1 *Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir.1995); *see E.E.O.C. v. Local 580, Int'l Ass'n of Bridge,*
2 *Structural & Ornamental Ironworkers*, 925 F.2d 588, 593 (2d Cir. 1991) (stating that a court's
3 "judicial discretion in flexing its supervisory and enforcement muscles is broad."). "Federal courts
4 are not reduced to approving consent decrees and hoping for compliance. Once entered, a consent
5 decree may be enforced." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 432 (2004).

6 **A. GOVERNMENT OF GUAM'S FINANCIAL PLAN**

7 As noted, pursuant to the Consent Decree, the parties agreed that the Government of Guam
8 would submit a financial plan. *See* Docket No. 55. The parties presumably understood that without
9 a funding plan the Government of Guam would never be able to come into compliance with the
10 terms of the Decree. Although the Government of Guam filed a financial plan in June 2004 and an
11 amended plan in October 2004, the Government of Guam took no affirmative steps to implement
12 said plan. With no funding mechanism in place, the Government of Guam's compliance with the
13 Consent Decree was not possible.

14 The Governor of Guam and five financial experts have now advocated the financing plan
15 proposed by GBB, wherein, Consent Decree projects would be financed with Section 30-backed
16 revenue bonds. Again, the plan envisioned that Section 30 funds would serve only as collateral and
17 would be released to the General Fund once tipping fees funding the debt service were realized.
18 Despite the recommendation endorsed by the financial experts and the Governor of Guam,
19 (*see* footnote 14 *supra*), the Legislature had thus far chosen not to enact legislation which would
20 authorize such a course of action. Rather than appropriating funds for SWMD's operations or the
21 Consent Decree projects, the past Legislature enacted legislation that removed \$2.5 million
22 generated from the Recycling Revolving Fund that was allocated to SWMD for recycling efforts.
23 By enacting such legislation, the Legislature has, in effect, endorsed an increase in any proposed
24 tipping fee the public will have to bear. This is because GBB relied upon the availability of these
25 funds in determining the appropriate tipping fee to charge and in presenting a comprehensive solid
26 waste management plan that included recycling.

27 Without cooperation from the Guam Legislature to ensure a funding source for the Consent
28 Decree projects, it is undisputed that potential contractors will not invest the time and resources to

1 bid for these projects, since these contractors would have no adequate assurance of payment. As a
2 result, the Government of Guam could likely face an emergency situation where the work on the
3 Layon landfill would be stalled and the Ordot Dump would run out of airspace.

4 This court has repeatedly indicated its preference for the Governor of Guam and the
5 Legislature to work cooperatively in solving the solid waste crisis. For more than a year, this court
6 has made clear its message that there is a need for Guam's leaders to take a united approach in
7 reaching a solution:

8 It is without a doubt the responsibility of the Governor of Guam and every member
9 of the Guam Legislature to diligently ensure that the Ordot Dump is closed and that
10 the new landfill at Dandan be opened. It cannot be overemphasized that, at the end
11 of the day, it will take a commitment and concerted effort by both the executive and
12 legislative branches of Government of Guam to solve one of the most urgent crises
13 facing the island and its people."

14 Docket No. 177, at p. 8 (Dec. 14, 2007).

15 This court strongly urged the members of the Executive and Legislative branches to
16 cooperate and present a unified solution to the problem. Despite such
17 encouragement, there has been no progress.

18 Docket No. 218, at p. 8 (Jan. 24, 2008).

19 The past and current leaders have failed to take the bold measures necessary to
20 protect the lives and welfare of the citizens of Guam. The record in this case reveals
21 that the Executive and Legislative Branches, in several instances, have not been able
22 to work cooperatively to ensure compliance with the Consent Decree.

23 Docket No. 239, at p. 12 (Mar. 17, 2008).

24 The inability of the Government of Guam to comply with the terms of the Consent
25 Decree was not necessarily the result of a lack of effort on the part of the current
26 Governor or even DPW. Rather, there was a lack of concerted attention given by
27 those who could best address the magnitude of the problem for the past 22 years. .
28 . . . [T]his court has repeatedly prodded the current Guam Legislature to actively
participate in charting the course concerning the closure of the Ordot Dump and the
opening of a new landfill. The Legislature has, at worst, impeded the Government
of Guam's ability to comply with the Consent Decree, and at best, taken no action
at all to meet the mandates of the Consent Decree.

...

At this point, however, the decision regarding the funding options is one
preferable left in the hands of the executive and legislative bodies. Because time is
of the essence and GBB's timetable will be adhered to, the decision must be made
expeditiously.

...

1 Notwithstanding this court's desire for cooperation in this regard, the Governor and
2 Guam Legislature are reminded that this court endowed the Receiver with the
3 authority to facilitate the "financing and/or borrowing of such funds necessary to
4 carry out the duties relating to the Consent Decree"

5 Docket No. 272, at pp. 2, 10 and 11 n.10 (Oct. 22, 2008).

6 The court has made clear that it will not tolerate further delay. This does not
7 preclude the Government of Guam from subsequently implementing a viable
8 financing plan. . . . [I]t remains the hope of this court that Guam's leaders will join
9 together in adopting a plan for the benefit of the people.

10 Docket No. 312, at pp. 3-4 (Dec. 10, 2008).

11 Despite the court's repeated pleas for cooperation and its concern over the clear lack thereof,
12 the Legislature has remained steadfast in its refusal to permit work at the Layon site to progress
13 smoothly.

14 Only \$20 million has thus far been obtained for funding Consent Decree projects out of the
15 \$159 million GBB has approximated the projects will cost, and there is no guarantee that the
16 additional funds needed are forthcoming through the proposed legislation. In fact, the Government
17 of Guam's most recent filing again proposes a "plan to plan for financing." *See* Docket No. 344.
18 It does not ensure that there is actual funding in place, and if history is to be a predictor of future
19 conduct, **the Government's plan is no plan at all.**

20 The Government of Guam's latest submission provides that it is exploring a new option
21 utilizing lease financing, wherein "a private contractor would be fully responsible for carrying out
22 the construction, financing, operation, and maintenance of the Layon facility." *Id.* at 4. The
23 Government of Guam further states that it had "issued a Request for Information ('RFI') for
24 proposals to 'Finance, Build, Operate, and leaseback ('FBOL') a New Solid Waste Facility.'" *Id.*
25 at 5. While the Government of Guam may characterize this as a "new approach," the record in this
26 case suggests otherwise.¹⁵ Since as early as 2004, the Government of Guam recognized the option

27 ¹⁵ In prior pleadings or at prior hearings, the Government of Guam had discussed the option of
28 seeking a private company to either build the new landfill or finance it.

- As the USEPA's response notes, in its October 2004 financial plan, the Government of
Guam proposed to fund Consent Decree projects through a combination of existing Solid
Waste Management Fund monies, aggressive pursuit of grants, Design-Build-Operate-
Transfer project execution and issuance of special activity bonds. *See* Docket No. 69,

1 of partnering with the private sector, yet the fact remains that years later, the Government of Guam
2 is still not any further along in securing a private company who would be interested in building or
3 financing the new MSWLF. While the court commends the Government of Guam for attempting
4 to seek private financing, the court will not delay its timetable while waiting for a private financier
5 to come along.¹⁶

6 It is clear that the Guam Legislature has, at least to date, chosen not to follow the
7 recommendations of GBB and the five financial experts, nor has it supported the Governor with
8 respect to funding the Consent Decree needs. The Government of Guam has held steadfast that it
9 lacks the funds to do what it agreed to do under the Consent Decree. No longer will that suffice to
10 stave off the inevitable. The Ordot Dump is quickly running out of airspace. GBB's progress at
11 Layon must continue to move forward before the Ordot Dump reaches its capacity. To borrow a
12 phrase from our new President Barack Obama: "A failure to act, and act now, will turn crisis into
13 a catastrophe." By failing to pass the necessary legislation the Legislature leaves the Government
14 of Guam with no other alternative but to make cash payments for the Consent Decree projects.

15
16 Attachment 14.

- 17 • At the December 20, 2006 status hearing before Judge Manibusan, the Governor's legal
18 counsel said ". . . there has been a statement made by the public companies that are
19 interested in opening the new landfill that they could have a new landfill open within six
20 months. . . . [W]e still got to weigh the credibility of some of these companies that would –
21 that are making these representations and evaluate their plans and, you know, that's
22 something that we're looking at right now. As we speak, we are starting negotiations with
23 private companies to see if it really can be done, as they believe it could be done within six
24 months. . . . We believe that if we were to enter into a public private partnership, having a
25 private enterprise take over the solicitation would increase the responses and facilitate the
26 closure in a more expeditious manner, which is something that the Governor's Office is
27 looking at and trying to move forward in very, very closely." Docket No. 67, pp. 43-45.
- 28 • In its Motion to Modify Consent Decree filed on January 31, 2007, the Government of Guam
stated: ". . . the changes in law have essentially made general fund and other fund monies
unavailable and so the Government will undergo a procurement process that allows for bids
which include private financing as an alternative to revenue bond or private activity bond
financing." Docket No. 76 at p. 10. (emphasis added).

¹⁶ The court is currently unaware of any private financier that has shown a serious interest in funding the closure of the Ordot Dump and the opening of the Layon landfill.

1 The court shares the concern that the people of Guam will experience true hardship if the
2 Government of Guam proceeds in this manner. Such potential hardship to the people, however, will
3 be the consequence of decisions made (or not made) by those whose primary roles are to create and
4 carry out policy decisions for the Government of Guam.¹⁷

5 As the court stated in its order of January 14, 2009 and reiterates here – GBB is not
6 recommending, nor is the court ordering, that the funds needed come from general operations. *See*
7 Docket No. 330. The Government of Guam's decision as to how to fund the required projects are
8 policy decisions that remain with the Governor and the Guam Legislature. This court is well aware
9 of the financial condition of our government and our island's economy. However, resolving such
10 issues are responsibilities which lie solely with Guam's leaders, and not with this court. For this
11 reason, the court again encourages Guam's leaders to cooperate in resolving the Ordot Dump crisis.

12 **B. THE ISSUE OF SITE SELECTION**

13 The Receiver indicated in its report that the Legislature's reluctance to fund the Consent
14 Decree projects may be because some members of the Legislature believe that the site selection for
15 the new MSWLF can be revisited. *See* Docket No. 352. If this is the case, the court emphasizes
16 again that the time for debate about the site for the new landfill has passed. The Consent Decree sets
17 out a very clear process. Pursuant to the Consent Decree, a comprehensive process was undertaken
18 by the Government of Guam that considered all potential sites and concluded that the Layon site was
19 by far the most appropriate site for the new landfill. This process has long since been completed.

20 The site selection process was extensively reviewed by the Guam Supreme Court in the case
21 *San Miguel v. Department of Public Works*, 2008 Guam 3, and the Court found no fault in the
22 Government of Guam's site selection process. The site selection process was also approved by
23 USEPA and accepted by this court pursuant to the terms of the Consent Decree. The completed
24 Hydrogeological Report only further confirms that the site selection was based upon objective

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27 ¹⁷ The court notes that the Government of Guam has raised the possible defenses of *force majeure*,
28 impracticability and impossibility. *See* Docket No. 344. The Government of Guam has not invoked
the dispute resolutions proceedings of the Consent Decree. Accordingly, the court will not address
these matters.

1 scientific criteria.¹⁸ *See Nat. Res. Def. Council v. U.S. E.P.A.*, 806 F. Supp. 1263, 1273 (E.D.
2 Va. 1992) (“Agency decisions should not be disturbed or substituted by a judge who, unlike agency
3 administrators, has no duty or expertise with regard to the statute.”). Attempts to revisit the site
4 selection at this point serves no purpose other than continuing delay. **Again, delay is not an option,**
5 **time is running out – there is only 895 days of airspace remaining at the Ordot Dump.**

6 **C. THE BINDING NATURE OF THE CONSENT DECREE**

7 It is undisputed, based purely on the record before this court, that the more recent inability
8 of the Government of Guam to move toward compliance with the Consent Decree has been, in large
9 part, the result of the actions or inactions of the Guam Legislature. However, not even the Guam
10 Legislature can dispute or change the fact that the Government of Guam is bound by the terms of
11 the Consent Decree. It cannot properly claim that its interests as the legislative branch have not been
12 represented in this case, nor can it further act to hinder the Government of Guam’s compliance with
13 the Consent Decree. *See Del. Valley Citizens’ Council for Clean Air v. Commw. of Pa.*, 674
14 F.2d 970 (3d Cir. 1982) (denying state legislators’ motion for intervention since Commonwealth’s
15 interests under a consent decree already adequately represented by Attorney General of the
16 Commonwealth).

17 The Consent Decree in this case was entered into by the parties to bring the Government of
18 Guam into compliance with the Clean Water Act, and to once and for all address the longstanding
19 health and safety hazard posed by the Ordot Dump. *See* Docket No. 55. The Government of Guam,
20 represented by the Attorney General – the Chief Legal Officer of the Government of Guam¹⁹ –
21 agreed to the terms of the Consent Decree. The court is mandated to ensure that the Government
22 of Guam fulfills its end of the bargain, without further obstruction, or interference, or undue delay.

25 ¹⁸ There appears to be an opinion shared by some members of the community that the Layon landfill
26 poses a risk of contamination to groundwater at Layon. The court encourages the village mayors
27 to work with GBB and GEPA in educating the public as to those concerns and as to the significant
differences between a landfill and a dump.

28 ¹⁹ *See* 48 U.S.C. § 1421g(d)(1).

1 The court's enforcement of the Consent Decree and its refusal to allow for further delay
2 underscores the severity of the health and environmental hazards especially experienced by the
3 residents of Ordot. The leaders of our island charged with the discretion and authority to ameliorate
4 these hazards must not lose focus. This is not merely an issue of economics. Rather, the "[f]ailure
5 to close the Ordot Dump will cause other environmental and health problems in addition to the
6 continued discharge of leachate. During the DPW's operation of the Ordot Dump, the Dump has
7 continued to pose a vector issue (*i.e.* flies, rodents, and other pests), an odor problem, and a fire
8 hazard." Docket No. 73, Arora Decl. In fact, representatives of the Government of Guam, along
9 with the court, have witnessed first hand such problems while on site visits to the Ordot Dump and
10 Lonfit River. It is undisputed that the conditions at the Ordot Dump are both alarming and
11 inexcusable. The court is mindful that the risk posed by failing to timely act could result in the
12 entire island becoming one large "Ordot Dump." It is a risk that this court will not accept.

13 It bears repeating that compliance with the Consent Decree and the avoidance of a real
14 catastrophe requires every single member of the Legislature to work with the Governor of Guam.
15 Understandably, there are difficult decisions to be made. Yet, the difficulty of these decisions are
16 significantly outweighed by the dangers to the health, welfare and safety of the people of Guam –
17 dangers that will exist until the Government of Guam comes into compliance with the Consent
18 Decree, and in turn, the Clean Water Act.

19 CONCLUSION

20 To achieve compliance with the Consent Decree and this court's Order of October 22, 2008,
21 the court **HEREBY ORDERS** that beginning March 1, 2009, the Government of Guam shall deposit
22 the amount of \$993,700.00 with Citibank. Thereafter, on a weekly basis, the Government of Guam
23 shall make deposits in accordance with the funding schedule as attached hereto.²⁰ As previously
24 stated herein, it is the Government of Guam's responsibility to determine the source(s) of these

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26
27 ²⁰ GBB shall make itself available to the Government of Guam to assist it in its continuing efforts
28 to secure alternative funding (*i.e.* federal grants) that then can be used for reimbursement for the
costs associated with the closure of the Ordot Dump and/or opening of the Layon landfill.

1 payments.

2 The court again encourages Guam's leaders to work together. This Order does not preclude
3 the Legislative and Executive branches from continuing its efforts to find viable alternative means
4 of financing the Consent Decree projects (*e.g.* Section 30-backed revenue bonds) at a later time.
5 Should this occur, the court will suspend the weekly payments provided the court is satisfied that
6 at a minimum:

7 1) The Legislature authorizes, without the need for any further legislative authorization or
8 action, the maximum amount of bonds needed for full implementation of the Consent Decree
9 projects as certified to the court by the Attorney General and Government of Guam's bond counsel;
10 and the Governor and the Guam Economic Development Authority in good faith and to the court's
11 satisfaction, move to sell the first series of these bonds as soon as possible and such other bonds at
12 a later date as are required to keep the Consent Decree projects funded and on schedule; or

13 2) The Government of Guam finds any other viable financing alternative that does not delay
14 or impede the timetable as previously court ordered.

15 **SO ORDERED.**



/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Feb 13, 2009